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1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1275

MAJOR WALTER COBB,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To The Honorable Chief Justice of the United States and The Associate Justices of The Supreme Court of United States:

The petitioner, Major Walter Cobb, prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above-entitled case on February 10, 1972.

A. The Opinion Below

There was no opinion nor finding of fact by the trial judge who convicted petitioner-appellant for violation of Title 21, Section 176(a) of the United States Code. The original conviction was affirmed by the Circuit Court of Appeals on May 27, 1968 (396 F2d 158). The Supreme Court of the

United States granted Certiorari on May 3rd, 1971 (402 U.S. 937) reversing the conviction of Cobb and co-petitioner Spivey and remanded the case to the Second Circuit Court of Appeals for "reconsideration in the light of this Court's decisions in Leary v. United States, 395 U.S. 6, and U.S. v. United States Coin and Currency, 401 U.S. 715". After taking additional briefs, the Circuit Court affirmed—as to Cobb on February 10, 1972, Docket No. 32148, Calendar No. 580, September Term, 1971, which has not yet been reported. A Stay of the Mandate was requested of the United States Circuit Court of Appeals on February 22, 1972, and no decision has yet been made on that request. The petitioner requested an extension of thirty (30) days from Associate Justice Honorable Thurgood Marshall which was granted giving the petitioner until April 9, 1972, to file the petition for certiorari.

B. Jurisdiction

The judgment of the Court of Appeals was re-entered on February 10, 1972. Petitioner Cobb is still enlarged on bail and the jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that the review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

1. The petitioner herein resubmits to this Court all questions presented in its original petition for certiorari filed in June, 1968, and asks the Court to take cognizance of all legal arguments made at that time and not decided.

2. Can the Circuit Court of Appeals overrule the Supreme Court of the United States with no additional evidentiary facts?

D. United States Constitution and the Statutes

United States Constitution, Fifth Amendment.

United States Constitution, Article III.

The statutes involved are: United States Code, Title 21, Section 176(a).

E. Summary Statement of Matters Involved

The summary statement of the facts of the case were presented to the Court in the Petition for Certiorari in the October Term, 1967. The only additional facts were, that upon remand to the Second Circuit Court of Appeals the Second Circuit asked for additional briefs by both the government and the petitioners, and reversed the judgment of conviction as to Spivey but affirmed as to Cobb. The brief submitted by Cobb requested an evidentiary hearing to determine whether the government factually proved that Cobb was aware that the Marijuana came from Mexico.

F. Reasons for Granting Writ

POINT I

Petitioner Cobb repeats all points previously submitted to the Court in the October 1967 Term, including the argument of knowledge of illegal importation.

POINT II

This Court should grant a Writ of Certiorari to reaffirm Article III of the United States Constitution where Section 1 stated "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

If the Second Circuit Court of Appeals can affirm a conviction after reversal from the Supreme Court of the United States and *without any additional testimony* (emphasis supplied), or without the trial Court submitting specific findings of fact, then the Second Circuit Court of Appeals is usurping the powers of the Supreme Court of the United States contrary to the Constitution of the United States.

CONCLUSION

In conclusion, the writ should be granted and the Court, in the exercise of its power, should order the judgment of conviction reversed.

Respectfully submitted,

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APPENDIX

Affirmance of the United States Court of Appeals on Remand

(As to Defendant Major Cobb)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 580—September Term, 1971.

(On Remand from the Supreme Court of the United States, May 3, 1971 Decided February 9, 1972.)

Docket No. 32148

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

MAJOR COBB and THOMAS SPIVEY,
Defendants-Appellants.

Before:

MOORE, HAYS and FEINBERG,
Circuit Judges.

On remand from the Supreme Court, 402 U.S. 937 (1971), conviction of defendant-appellant Thomas Spivey reversed and indictment dismissed as to him; conviction of defendant-appellant Major Cobb affirmed.

JOSEPH I. STONE, New York, N. Y., *for Defendants-Appellants Major Cobb and Thomas Spivey.*

Appendix—Affirmance of the United States Court of Appeals on Remand

WHITNEY NORTH SEYMOUR, JR., United States Attorney for the Southern District of New York, New York, N. Y., JOHN C. SABETTA and PETER F. RIENT, Assistant United States Attorneys, New York, N. Y., of counsel, *for Plaintiff-Appellee.*

PER CURIAM:

Defendants-appellants Major Cobb and Thomas Spivey with co-defendants, Allen Davidowitz, Rafael Astor, Richard Levin, Walter Hernick and Harold Epstein were indicted on January 25, 1967, for conspiring with each other and with Murray Lapidus, Danny Klein, Henry Cardona, and Richard Kamberg to receive, conceal, buy, sell and transport marijuana which had been imported contrary to law. 21 U.S.C. § 176(a). Cobb and Spivey were convicted. The case against the remaining defendants was severed. On appeal this Court affirmed. 396 F.2d 158 (1968). On May 3, 1971, the Supreme Court granted *certiorari,* vacated the convictions and remanded the case to this Court for "reconsideration in the light of this Court's [its] decisions in *Leary* v. *United States,* 395 U.S. 6 (1969) and *United States* v. *United States Coin & Currency,* 401 U.S. 715 (1971)." 402 U.S. 937 (1971). The judgment of this Court of May 27, 1968, accordingly was vacated. On remand additional briefs from the parties were requested. Such briefs have been submitted and the points raised therein have been considered. The evidence presented at the trial has been reconsidered as it relats to the points now in issue.

Appendix—Affirmance of the United States Court of Appeals on Remand

The Government concedes insufficiency of evidence to establish knowledge of illegal importation as to Spivey and that he "is entitled to have his conviction reversed." Govt. Br. 4, 6. The case, however, as to Cobb is quite different. Information was given to Cobb by a co-conspirator that the marijuana was being imported from Mexico. His request that the co-conspirator defer delivery does not negate his knowledge of the source.

Cobb also argues that with the trial court's dismissal of the indictment as to co-conspirator Allen Davidowitz and the reversal as to Spivey, he "will remain as a 'single conspirator' requiring reversal under Judge Waterman's decision in *U. S.* v. *Roupinion, et al.*, (decided August 23, 1971)."[1] This conclusion is not supported by the facts. Cobb at no time was a single conspirator. Amongst others were Astor, Levin, Hernick, Epstein, Lapidus, Klein, Cardona and Kamberg. The proof connected Cobb with one or more of this group.

Cobb's conviction affirmed; Spivey's conviction reversed and indictment as to him dismissed.

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[1] Citation undoubtedly intended to be *United States* v. *Hysohion, et al.*, 448 F.2d 343 (2d Cir. 1971).

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OCTOBER TERM, 1971

MAJOR WALTER COBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1275

MAJOR WALTER COBB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Southern District of New York, petitioner and one Spivey were convicted of having conspired with others to receive, conceal, buy, sell, and transport marijuana known to have been illegally imported, in violation of 21 U.S.C. (1964 ed.) 176a. Each was sentenced to five years' imprisonment. The court of appeals affirmed. 396 F.2d 158. Thereafter this Court granted a petition for a writ of certiorari and remanded the case to the court of appeals in light of the intervening decisions in *Leary* v. *United States*, 395 U.S. 6, and *United States* v. *U.S. Coin & Currency*, 401 U.S. 715. 402 U.S. 937. On remand, the

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court of appeals reexamined the evidence as to both defendants with respect to the critical issue (in view of *Leary*) of knowledge of illegal importation of the marijuana. As to Spivey, the government conceded and the court agreed that the evidence was insufficient; however, as to petitioner the court found that he had the requisite knowledge since he had been told by a co-conspirator that the marijuana was being imported from Mexico. Accordingly, the court affirmed his conviction.

Petitioner here reasserts the various arguments advanced in the previous petition for a writ of certiorari.[1] The pertinent facts and legal arguments are set forth in our prior Memorandum in Opposition (No. 231, O.T., 1968).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

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[1] Petitioner's additional contention that the court of appeals could not decide the factual issue as to his knowledge of importation without remanding the case to the district court for new testimony or findings of fact is plainly erroneous. This Court's remand order required no such new testimony or district court findings, but merely a re-evaluation of the record by the court of appeals in light of *Leary*. That mandate was complied with.